Supreme Court, U.S.
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Nos. 96-1839 and 96-8626

In the Supreme Court of the United States

OCTOBER TERM, 1996

QUENTIN T. WILES, PETITIONER

v.

UNITED STATES OF AMERICA

PATRICK J. SCHLEIBAUM, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the securities fraud count of the indictments was duplicitous.

2. Whether the district court's unanimity instruction on the securities fraud count was adequate.

3. Whether the district court's failure to submit the issue of materiality to the jury on the false statements count tainted petitioner Wiles' conviction on the wire fraud count.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A64)[1] is reported at 102 F.3d 1043.

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[1] "Pet. App." refers to the appendix filed in No. 96-1839.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1996. A petition for rehearing in No. 96-1839 was granted in part and denied in part on February 14, 1997. Pet. App. B1-B8. The petition for a writ of certiorari in that case was filed on May 12, 1997. The cross-petition for a writ of certiorari in No. 96-8626, which followed the government's petition for a writ of certiorari in No. 96-1430, was filed on April 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of Colorado returned an indictment charging Patrick J. Schleibaum with making false statements to the government, in violation of 18 U.S.C. 1001 (Count 1); and securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff(a) (Count 2). In a separate three-count indictment, Quentin T. Wiles was charged with making false statements, in violation of 18 U.S.C. 1001 (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff(a) (Count 2); and wire fraud, in violation of 18 U.S.C. 1343 (Count 3). Following a jury trial in June 1994, Schleibaum was convicted on both counts against him, sentenced to 24 months' imprisonment, and fined $6,000. Following a separate jury trial in July 1994, Wiles was convicted on all three counts against him, sentenced to 36 months' imprisonment, and fined $60,000. A divided court of appeals, sitting en banc, reversed petitioners' false statement convictions on Count 1 of each indictment, but affirmed the

remainder of their convictions. Pet. App. A1-A64.[2] On March 10, 1997, the government petitioned for a writ of certiorari, seeking review of the court of appeals' reversal of Schleibaum's false statement conviction. *United States* v. *Schleibaum*, No. 96-1430.[3]

1. Petitioner Wiles was the former chairman of the board and chief executive officer of Miniscribe, a manufacturer of computer disk drives; cross-petitioner Schleibaum was Miniscribe's chief financial officer and, later, vice-president. In January, Schleibaum and other Miniscribe executives discov-

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[2] Wiles' appeal was consolidated with that of Schleibaum. Following argument, but before the release of the panel's opinion, a majority of the court's active judges voted to rehear Part II.A of the opinion en banc.

[3] The question presented in the government's petition in No. 96-1430 is whether Schleibaum was entitled to a reversal of his conviction on Count 1 under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), on the ground that the trial court, without objection, resolved the issue of materiality itself rather than submitting it to the jury. (Because of petitioner Wiles' advanced age, the government did not file a similar petition for certiorari in his case.) We asked this Court to hold the petition in No. 96-1430 pending the Court's decision in *Johnson* v. *United States*, No. 96-203, and then to dispose of it accordingly. On May 12, 1997, this Court decided *Johnson* and held that, contrary to the court of appeals' holding in this case, *Gaudin*-type errors to which no objection was made at trial are amenable to review under the plain-error standard of Federal Rule of Criminal Procedure 52(b). 117 S. Ct. 1544. Because, to the extent that it reversed petitioners' convictions on Count 1, the court of appeals' decision is inconsistent with *Johnson*, this Court should grant the government's petition for certiorari in No. 96-1430, vacate the court of appeals' decision with respect to respondent (and cross-petitioner) Schleibaum, and remand for further proceedings in light of *Johnson*.

ered that the company had an "inventory hole": a discrepancy between the actual dollar value of the inventory and the value recorded on Miniscribe's books. In October 1987, Miniscribe's management advised Wiles of the inventory hole. Because the inventory hole revealed that Miniscribe had been less profitable than widely believed, petitioners and others sought to conceal it by falsely inflating the inventory count and hiding the false count from Miniscribe's auditors. As a result, Miniscribe reported false profits in quarterly and annual earnings statements filed with the Securities and Exchange Commission (SEC). Miniscribe also disseminated false information to the public through its annual reports and quarterly financial statements. Relying on those false financial reports, Standard Chartered Bank of London extended Miniscribe $90 million in credit; the bank lost $30 million of that amount as a result of petitioners' cover-up of the inventory hole. Pet. App. A2-A14.

Petitioners were charged in separate indictments with making false statements (Count 1) and securities fraud (Count 2); Wiles alone was charged in an additional count with wire fraud (Count 3). An introductory section of each indictment, under the heading "The Scheme," contained a description of petitioners' scheme to defraud. The first paragraph of Wiles' indictment stated that, from August 1987 to March 1989, he and others engaged in an unlawful scheme to defraud, perpetrated "through materially false and misleading financial statements, misrepresentations and omissions regarding Miniscribe's inflated inventory, inflated income before taxes and inflated net income, which financial statements were reported and disseminated to the SEC, to Miniscribe shareholders, to unwitting purchasers and sellers of Miniscribe

stock and to Standard Chartered." Pet. App. C3-C4. Paragraphs 2-19 of the Wiles indictment set forth the actions that he committed in furtherance of that scheme. Those actions included filing with the SEC an annual "10-K" report for the year 1987 containing false statements about Miniscribe's inflated inventory, income before taxes, and net income (*id.* at C5 (¶ 11)); filing with Miniscribe's shareholders an annual report for the year 1987 containing the same false statements (*id.* at C5-C6 (¶ 12)); filing quarterly "10-Q" reports with the SEC on May 10, August 11, and November 15, 1988, about the inflated inventory, income before taxes, and net income (*id.* at C6 (¶ 13)); insider trading in connection with the sale of 150,000 shares of Miniscribe stock during the period April 25 to May 17, 1988 (*id.* at C6-C7 (¶ 14)); and causing Standard Chartered to lend Miniscribe approximately $70 million in reliance on, among other things, Miniscribe's false 10-K report for the year 1987 and its false 10-Q quarterly reports for the year 1988 (*id.* at C7 (¶ 16)). The 19-paragraph description of the scheme to defraud was realleged and incorporated in each count of both indictments. *Id.* at C8-C9.

The indictment against Schleibaum was similar to the Wiles indictment, but it charged a slightly broader scheme, running from January 1987 until August 1989. Schleibaum Indictment 4 (¶ 1). It also charged two different and discrete instances of insider trading: 19,998 shares in August 1987 (*id.* at 5 (¶ 5)) and multiple sales between August 1, 1988, and January 26, 1989 (*id.* at 8 (¶ 14)).

The false statement count (Count 1) of each indictment was based on petitioners' role in filing a false annual 10-K report with the SEC for fiscal year 1987. It alleged that the report falsely stated that Mini-

scribe's inventory was $85,172,000, its income before taxes $33,201,000, and its net income $31,147,000, even though, as petitioners knew, those figures should have been substantially lower. Pet. App. C8. The wire fraud count of Wiles' indictment (Count 3) was based on Standard Chartered's loan to Miniscribe in reliance on the same misrepresentations concerning Miniscribe's financial condition. *Id.* at C9-C10.

The securities fraud count (Count 2) of petitioner Wiles' indictment charged, in relevant part, that:

> From in or about August of 1987 to in or about February of 1989, in the State and District of Colorado and elsewhere, [Wiles], having possession of material non-public information concerning MiniScribe's inflated inventory, income before taxes and net income, all resulting from the inventory shortfall and illicit efforts to conceal it, directly and indirectly, by the use of the means and instrumentalities of interstate commerce and of the mails, willfully did: (1) employ a device, scheme and artifice to defraud; (2) make untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (3) engage in acts, practices and courses of business which operated as a fraud and deceit upon MiniScribe shareholders and unwitting purchasers and sellers of MiniScribe stock in connection with their purchases and sales of said security.

Pet. App. C9. Count 2 of the indictment against cross-petitioner Schleibaum contained virtually identical language. See Schleibaum Indictment 10 (¶ 3). Each of the three enumerated forms of misconduct

stated a distinct "means or method" of committing securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), which forbids the use of "any manipulative or deceptive device or contrivance" in violation of rules promulgated by the SEC. See generally SEC Rule 10b-5 (codified at 17 C.F.R. 240.10b-5)).

2. At petitioners' trials, in accordance with then-existing Tenth Circuit precedent, the district court ruled that, for purposes of Count 1 (the false statement count), materiality was a question for the court, rather than the jury, to decide. Petitioners did not object to that method of deciding the materiality element. The court then determined, over petitioners' objection, that the government had met its burden on that element by producing evidence of the false statements' materiality. Pet. App. A17-A18. In instructing on the elements of the securities fraud count (both trials) and the wire fraud count (Wiles' trial), however, the court defined materiality and charged the jury that, to convict on those counts, it had to find that the misrepresentations or omissions at issue were material. *Id.* at D5-D6.[4] Defense coun-

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[4] As to Count 2, the securities fraud count, the court instructed:

> If you should decide that a particular statement or a particular omission was false or misleading at the time that it was made, then you must determine if the fact stated or omitted was a material fact, or a material omission under the evidence received in this case.
>
> In order for you to find a material fact or a material omission, the government must prove beyond a reasonable doubt that the fact misstated or the fact omitted was of such importance that it could reasonably be expected to

sel expressed satisfaction with those instructions. 7/28/94 Tr. 49 (C.A. App. 3389) (Wiles); 6/16/94 Tr. 37 (C.A. App. 357) (Schleibaum). Finally, the court instructed each jury that, to convict on Count 2, it also needed to reach unanimous agreement that the rele-

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cause or to induce a person to invest, or to cause or to induce a person not to invest.

The securities fraud statute under which Count 2 of the indictment is brought is concerned only with such material misstatements, or such material omissions, and does not cover minor, or meaningless, or unimportant ones.

7/28/94 Tr. 19 (C.A. App. 3359); see Pet. App. D5. ("7/28/94 Tr." refers to the transcript of Wiles' trial; except where otherwise noted, the relevant instructions given at Schleibaum's trial were the same as or similar to those given at Wiles' trial.)

As to the wire fraud count (Count 3) against Wiles, the court instructed:

The term, "false or fraudulent pretenses, representations, or promises" means a statement or an assertion which contains a material or important fact, or a material or important aspect of the matter in question, and that was either known to be untrue at the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with the intent to defraud.

A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

The term, "false or fraudulent pretenses, representations, or promises" includes actual direct false statements, as well as half-truths, and includes the knowing concealment of facts that are material or important to the matter in question that were made or used with the intent to defraud.

Pet. App. D6; 7/28/94 Tr. 24-25 (C.A. App. 3364-3365).

vant defendant had engaged in a particular means or method set forth in that count, even though it did not need to find that he had engaged in all three of those means or methods.[5]

After the jury in the Wiles trial had retired to deliberate, it submitted the following note to the court: "Can you clarify the portion of your instruction to jury regarding the requirement that we agree unanimously on one of many individual charges in each count of the indictment." 7/29/94 Tr. 3 (C.A. App. 3393). In response to that query, the district court, without objection, see 7/29/94 Tr. 3-5 (C.A. App. 3393-3395), instructed:

> In Count 1, the government alleged that the Form 10K report for the fiscal year 1987 was false in the statement of the company's inventory as

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[5] At each trial, the court instructed:

> Count 2 of the indictment charges [defendant] with a violation of federal law concerning securities fraud. The indictment alleged a number of separate means or methods by which the defendant is accused of violating this law.
>
> The government is not required to prove all of the means or methods alleged in Count 2 of the indictment, but each juror must agree with each of the other jurors, however, that the same means or method alleged in Count 2 was, in fact, engaged in or employed by the defendant in committing the crime charged in Count 2 of the indictment. The jury need not unanimously agree on each means or method, but, in order to convict, must unanimously agree upon at least one such means or method as one engaged in by the defendant. Unless the government has proven the same means or method to each of you, beyond a reasonable doubt, you must acquit the defendant of the crime charged in Count 2 of the indictment.

Pet. App. A35 n.14.

$85,172,000.00, that its income before taxes was $33,201,000.00, and that its net income was $31,147,000.00. These are three statements alleged to be false.

The government is not required to prove all three of them. It is sufficient for one element of the offense charged in Count 1 for the government to prove beyond a reasonable doubt that at least one such statement was false, fictitious or fraudulent, and the jury must unanimously agree on which statement has been proven to be false.

In Count 2, the government alleged that in connection with the purchases and sales of MiniScribe stock, the defendant, Q. T. Wiles, with knowledge concerning MiniScribe's inflated inventory, income before taxes and net income, all resulting from illicit efforts to conceal an inventory shortfall, one, employed a device, scheme or artifice to defraud. This refers to the scheme to conceal an inventory shortage. Or, two, made untrue statements of material facts or made material omissions of fact causing statements made to be misleading. This refers to false statements in the annual reports. Or, three, engaged in a fraud and deceit upon MiniScribe shareholders and unwitting purchasers and sellers of the stock. This refers to insider trading, that is, using insider information on the sale of his stock.

The government need not prove all three of these means or methods of committing the crime of securities fraud. *It is necessary, however, before there can be a conviction on this count, that the jury must unanimously agree that at*

least one of these means or methods has been proven beyond a reasonable doubt, and all jurors must agree on the same means or method.

Count 3 is an allegation that the defendant defrauded Standard Chartered Bank by the scheme described in [the] indictment, using the false statements alleged in Count 1, and that money was transferred by wire in furtherance of that scheme.

So just as with Count 1, while not all of the false statements alleged there must be proved, the jury must be satisfied beyond a reasonable doubt that at least one false statement was made, and you must all agree on the same one.

7/29/94 Tr. 6-8 (C.A. App. 3396-3398) (emphasis added).[6]

3. After petitioners were convicted, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Fifth and Sixth Amendments require jury consideration of the materiality issue when it is

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[6] During its deliberations at Schleibaum's trial, the jury sent a note to the court, asking: "[H]ow many parts are there to Count 1 and do we have to unanimously agree on only one in order to find for guilt." The court, without objection, instructed the jury that Count 1 alleged that three statements were false on the Form 10-K report that was filed with the SEC for fiscal year 1987, that the government was required to prove that at least one of those three statements was false, and that, to convict, the jury was required to agree unanimously upon the commission of a particular false statement. The court also stated that the government was not required to prove each allegation in the scheme that was described in the opening portion of the indictment and realleged in each count, but that it was required to prove substantially the scheme alleged. 6/16/94 Tr. 40-43 (C.A. App. 360-363).

an element of a charged offense. On appeal, relying on *Gaudin*, petitioners argued that their false statements convictions under Count 1 should be reversed because, with respect to that count, the district court had decided the element of materiality without submitting it to the jury. Before the release of the panel's opinion, the court of appeals voted to rehear en banc the portion of the appeal dealing with petitioners' *Gaudin* claim.

A divided en banc court reversed petitioners' convictions on Count 1. The majority held that the type of error that occurred here—a failure to instruct the jury on an element of the offense—is a "structural" defect that is not amenable to either harmless- or plain-error analysis under Federal Rule of Criminal Procedure 52, but is instead reversible *per se*. See Pet. App. A18-A33. The court noted, however, that the district court's failure to instruct on materiality on Count 1 had no bearing on the instructions on the remaining counts and therefore did not, as petitioner Wiles had claimed, taint his conviction on Count 3. *Id.* at A29 n.11; see also *id.* at A15 n.5 (rejecting, on plain-error review, Wiles' claim that instructions on Count 3 were "equivocal").

The court affirmed petitioners' convictions on the securities fraud count of their respective indictments, rejecting their contention that the count was duplicitous. Pet. App. A33-A37. That count, the court held, charged petitioners with engaging in several means and methods of conducting an ongoing scheme to defraud. "We draw a distinction between an indictment that charges multiple offenses for distinct and separate criminal acts in the same count, and an indictment that charges multiple means of carrying out one offense associated with a continuing course

of criminal conduct." *Id.* at A35. The court noted, moreover, that the district court, due to the complexity of the scheme and the concern over nonunanimous verdicts, had in fact given the jury a specific unanimity instruction. The court found that such an instruction "suffice[d] to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *Id.* at A35-A36.

4. Petitioner Wiles petitioned for rehearing, arguing that the court had "overlooked and misconstrued" certain issues. He claimed, *inter alia*, that the court had erred in (1) overlooking his claim that the government had failed to establish the materiality of the statements alleged in the false statement count; (2) holding that the instructions given on the securities fraud count did not violate his right to a unanimous verdict; and (3) holding that the district court's failure to instruct the jury as to materiality on the false statements count did not taint the materiality instruction on the wire fraud count.

The court granted rehearing only as to the first of those claims. Pet. App. B1-B8. The court agreed that, under Tenth Circuit precedent, the prohibition against double jeopardy required it to address a claim of evidentiary insufficiency on a count that has been reversed on appeal because of procedural error at trial. *Id.* at B6. On the merits, however, the court rejected Wiles' claim that the evidence was insufficient to support the element of materiality as to Count 1. Indeed, the court determined that "Miniscribe's false 1987 10-K Report was capable of influencing, and did in fact influence, the SEC to take remedial action against Defendant." *Id.* at B7.

ARGUMENT

1. Cross-petitioner Schleibaum contends (see Pet. 2-5; see also Wiles Pet. 7 n.2) that Count 2 is duplicitous in that it charges multiple offenses in a single count. That claim is without merit.

An indictment is duplicitous if it charges two or more wholly distinct crimes in a single count. *United States* v. *Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992); *United States* v. *Dashney*, 937 F.2d 532, 540 n.7 (10th Cir.), cert. denied, 502 U.S. 951 (1991); *United States* v. *Berardi*, 675 F.2d 894, 897 (7th Cir. 1982). The traditionally expressed dangers of duplicitous counts include the possibility that the defendant may lack adequate notification of the charges against him; that he may be prejudiced in a subsequent double jeopardy defense; that the jury may convict him without unanimously agreeing on the commission of a particular offense; and that he may be prejudiced by evidentiary rulings at trial. See, *e.g.*, *United States* v. *Sasser*, 971 F.2d 470, 477 n.5 (10th Cir. 1992); *Aracri*, 968 F.2d at 1518; *Berardi*, 675 F.2d at 899; *United States* v. *UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977).

An indictment is not duplicitous, however, if the count charges the commission of a single offense or scheme by a variety of different means. See, *e.g.*, *Aracri*, 968 F.2d at 1518; *Berardi*, 675 F.2d at 898; *United States* v. *Pavloski*, 574 F.2d 933, 936 (7th Cir. 1978). As Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides, "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." That rule "necessarily contemplates that

two or more acts, each one of which would constitute an offense standing alone, may be joined in a single count without offending the rule against duplicity." *Berardi*, 675 F.2d at 898; accord *Pavloski*, 574 F.2d at 936.

The courts of appeals have generally rejected duplicity challenges to counts of an indictment that charge several criminal acts that are part of a single unlawful scheme, even if those acts could have been separately charged in different counts.[7] In particular, "[a]s long as the essence of the alleged crime is carrying out a single scheme to defraud, then aggregation is permissible." *United States* v. *Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081, 1082 (1990); see also 1 L. Sand, et al., *Modern Federal Jury Instructions* ¶ 9.07, at 9-17 (1997) ("[W]here the crime charged involves a scheme to defraud perpetrated by the use of false statements, the jury need not agree with respect to which statements were false, provided there is unanimity concerning the existence of the fraudulent scheme."). Here, the se-

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[7] See, *e.g.*, *United States* v. *Bruce*, 89 F.3d 886, 889-890 (D.C. Cir. 1996); *United States* v. *Pless*, 79 F.3d 1217, 1220 (D.C. Cir.), cert. denied, 117 S. Ct. 251 (1996); *United States* v. *Jaynes*, 75 F.3d 1493, 1502 (10th Cir. 1996); *United States* v. *Pollen*, 978 F.2d 78, 84 (3d Cir. 1992), cert. denied, 508 U.S. 906 (1993); *United States* v. *Hammen*, 977 F.2d 379, 383 (7th Cir. 1992); *United States* v. *White*, 879 F.2d 1509, 1512 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990); *United States* v. *Shorter*, 809 F.2d 54, 56 (D.C. Cir.), cert. denied, 484 US. 817 (1987); *United States* v. *Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081, 1082 (1990); *Berardi*, 675 F.2d at 898; *United States* v. *Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983); cf. *United States* v. *Prescott*, 42 F.3d 1165 (8th Cir. 1994) (cited in Schleibaum Pet. 5) (rejecting duplicity claim on waiver grounds).

curities fraud count of the indictment—Count 2—alleged that petitioners engaged in an ongoing scheme to commit securities fraud from 1987 to 1989. Because the specific criminal acts alleged in Count 2 constituted different means or methods by which petitioners executed that scheme, that count was not duplicitous. In any event, even if it had been improper to charge those means or methods in a single count, any error in submitting that count to the jury would have been cured by the district court's specific unanimity instruction, see pp. 8-9 & n.5, *supra*, which explained that, to convict, the jury had to agree unanimously that the defendant had engaged in a particular means or method. See generally *United States* v. *Bruce*, 89 F.3d 886, 890 (D.C. Cir. 1996).

2. Petitioner Wiles separately contends, however, that those jury instructions were insufficient to ensure his right to a unanimous verdict on Count 2. See Wiles Pet. 11-24.[8] In making that argument,

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[8] Only petitioner Wiles clearly presents an independent claim that his conviction should be reversed because the jury failed to return a unanimous verdict. See Wiles Pet. i (questions presented); see also *id.* at 7 n.2. Cross-petitioner Schleibaum does not raise that claim either in his question presented (see Pet. ii) or in his reasons for granting the petition (see *id.* at 5). Instead, he suggests, in passing and in his statement of the case, only that "[t]he unanimity instruction given to the jury did not cure the duplicity problem" that he alleges. *Id.* at 4. See Pet. App. A35 & n.14. Moreover, even if Schleibaum had properly presented a distinct unanimity claim of his own, that claim would be no more worthy of this Court's review than petitioner Wiles' claim: Like Wiles, Schleibaum failed to propose a jury instruction that would have cured any unanimity concern he might now allege, and, as discussed below, the district court would not have been required to give such an instruction in any event.

Wiles no longer appears to contend that the jury was permitted to convict him without unanimously agreeing on at least one of the three "means or methods" set forth in Count 2. As the court of appeals observed, the district court foreclosed any such claim by "instruct[ing] each jury that although individual jurors need not agree on all the means or methods by which [petitioners] committed securities fraud, they must unanimously agree upon at least one such means or method to convict [them] of securities fraud." Pet. App. A35; see *id.* at A35 n.14.

Instead, Wiles bases his unanimity claim on the contention that, even in unanimously agreeing on one of the "means or methods" set forth in Count 2, the jury may not have been unanimous as to the specific acts that constituted that means or method. See, *e.g.*, Wiles Pet. 12-16, 19-21. In his view (see, *e.g.*, Pet. 14), the second means or method (which alleges "untrue statements of material facts") could be construed to embrace "six distinct 'untrue statement[s],'" and the third means or method (which alleges "fraud and deceit" in connection with the sale of securities) could be construed to embrace what he characterizes (see *ibid.*) as two separate episodes of insider trading. As a result, Wiles concludes, the jury might have unanimously found that he engaged in the second or third "means or method" without unanimously agreeing on which false statement or which episode of insider trading justified that finding.

That conclusion—that the jury instructions did not require unanimity on the specific acts that formed the basis for the three "means and method" charged in Count 2—is subject to question. The court's supplemental instruction (see pp. 9-11, supra) clearly required unanimity as to a specific "statement"

proved to be false in Counts 1 and 3; the court also required that "all jurors must agree on the same means or method" that formed the basis of Count 2. A reasonable jury, interpreting these instructions in context, would likely have concluded that all jurors must agree on the specific acts found to constitute the violations on all three counts. In any event, Wiles' claim, even if it could be raised on the instructions in this case, does not warrant further review.

a. As an initial matter—although the government did not raise this point in the court of appeals—petitioner Wiles failed to present an adequate and contemporaneous challenge to the district court's jury instructions on the specific grounds that he now advances. Wiles did move to dismiss Count 2 as duplicitous, and, at the charge conference, he did object to the initial instruction on that count as "confusing" on the ground that it charged three separate means or methods of committing securities fraud and (what appears to be essentially the same objection) that it covered "two separate transactions": *i.e.*, insider trading and concealment of the inventory hole, which were two of the means or methods charged. See 7/27/94 Tr. 9-11 (C.A. App. 3297-3299); see also *id.* at 9 (C.A. App. 3297) (noting that "[t]his was the subject of our motion to dismiss").

Like cross-petitioner Schleibaum, however, Wiles did not squarely object to the instructions at the charge conference on the distinct ground—now the basis of his unanimity challenge—that a unanimous finding with respect to any given means or method might itself rest on non-unanimous findings with respect to specific acts. Nor does he appear to have proposed jury instructions of his own that would have

addressed that concern. Moreover, he did not object to the supplemental instructions that the district court issued in response to the jury's request during its deliberations for clarification of the unanimity requirement. See 7/29/94 Tr. 3-5 (C.A. App. 3393-3395); see also 6/16/94 Tr. 39-40 (C.A. App. 359-360) (Schleibaum trial) (defense counsel's expression of agreement with instructions given in response to jury request for clarification of unanimity requirement with respect to Count 1). In sum, Wiles gave the district court inadequate notice of the unanimity claim that he now advances, see Fed. R. Crim. P. 30, and the extent to which he has preserved that claim for this Court's review is therefore uncertain. See generally *United States* v. *Olano*, 507 U.S. 725 (1993) (describing plain-error review under Federal Rule of Criminal Procedure 52(b) for "forfeited" errors).[9]

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[9] Moreover, the court of appeals itself did not clearly address the unanimity claim that Wiles presents in his petition. Instead, that court acknowledged "the concern over nonunanimous verdicts" and held that the district court had met that concern by "tender[ing] a unanimity instruction to the respective juries as part of their instructions on count two." Pet. App. A35. The court understood Wiles to have argued that the jury "did not understand [that] unanimity instruction," and it rejected that argument on the ground that "[w]e must presume that the jurors remained loyal to their oaths and conscientiously followed the district court's instructions." *Id.* at A36-A37. The court did not, however, explicitly address the separate claim that the district court had erroneously failed to require unanimity with respect to the particular acts constituting any given means or method. For that reason alone, the court of appeals' opinion cannot be said to have created or deepened any circuit conflict that Wiles alleges on the unanimity issue.

b. In any event, petitioner Wiles would not have been entitled to a more detailed unanimity instruction even if he had proposed one. "[D]ifferent jurors may be persuaded by different pieces of evidence [of criminal wrongdoing], even when they agree on the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Schad* v. *Arizona*, 501 U.S. 624, 631-632 (1991) (plurality opinion) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)); 501 U.S. at 649 (opinion of Scalia, J.) ("[I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission."). Moreover, "[w]e are convinced * * * of the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution, and we think that instead of such a test our sense of appropriate specificity is a distillate of the concept of due process with its demands for fundamental fairness * * * and for the rationality that is an essential component of that fairness." *Id.* at 637 (plurality opinion).

Because that inquiry turns on the nature of the specific criminal statute at issue—here, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b)—petitioners' reliance on decisions (and circuit conflicts) involving other federal statutes (see Pet. 16-24) is unavailing.[10] Section 10(b) makes it a crime

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[10] Moreover, those decisions do not support Wiles' position even by analogy. For example, in *United States* v. *Payseno*, 782 F.2d 832 (9th Cir. 1986), and *United States* v. *Holley*, 942 F.2d 916 (5th Cir. 1991), the courts found that the indictments in question were duplicitous, and reversed the defendants' convictions, because the jury in each case had been given no

specific unanimity instruction beyond the general instruction that its verdict had to be unanimous. See also *Bins* v. *United States*, 331 F.2d 390, 393 (5th Cir.), cert. denied, 379 U.S. 880 (1964). The instructions given in this case, however, went far beyond the general unanimity instructions disapproved in those cases: the instructions specifically informed the jury that the indictment charged petitioners with committing securities fraud by three separate means or methods and that its verdict had to be unanimous as to at least one such means or method.

Wiles cites only one case in which a court reversed a conviction based on instructions even arguably similar to those given here. See Pet. 20-21. In *United States* v. *Beros*, 833 F.2d 455, 460-461 (3d Cir. 1987), the counts against the defendant alleged four separate theories of criminal activity (embezzlement, abstraction, stealing, and conversion of union funds) and enumerated several distinct acts, any one of which might have provided the basis for a guilty verdict under those theories. The district court instructed the jury that it had to agree unanimously on a particular theory of criminality, but rejected a defense request for an instruction that would have informed the jury that it must unanimously agree upon the specific transaction that it believed supported the defendant's guilt under that theory. *Id.* at 458. The court of appeals reversed on the grounds that the instruction given was insufficiently specific and that the error was not harmless beyond a reasonable doubt (because there was a "significant possibility" that it might have resulted in a non-unanimous verdict). *Id.* at 463. *Beros*, however, relied (see *id.* at 460-461) upon *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), whose "distinct conceptual grouping" analysis was later rejected by the plurality in *Schad*. See 501 U.S. at 634-637. Moreover, unlike the defendants in *Beros*, see 833 F.2d at 458 & n.3, Wiles did not propose an instruction that would have removed the unanimity concern that he now raises; as a result, his claim, if preserved at all, is more appropriately addressed under the stringent plain-error standard of Federal Rule of Criminal Procedure 52(b) than under the harmless-error analysis applied in *Beros*. Compare *id.* at 462-463. Finally, as noted, *Beros* did not involve a scheme to defraud in violation of the securities laws.

to use or employ, in connection with the purchase or sale of a security, "any manipulative or deceptive device or contrivance" in violation of the rules and regulations prescribed by the SEC. Under that authority, the SEC promulgated Rule 10b-5, which makes it unlawful for a person, in connection with such a purchase or sale, to (1) employ a device, scheme, or artifice to defraud, (2) make any false statement of material fact (or material omission), or (3) engage in any act, practice, or course of business that operates as a fraud or deceit upon any person. 17 C.F.R. 240.10b-5 (1990).

Whether or not a defendant is entitled to a jury instruction requiring unanimity with respect to any given one of those three "means or methods" of engaging in a "manipulative or deceptive device"—an instruction that both petitioners in fact received here—nothing in the statute or in Rule 10b-5 suggests that, on the facts of this case, Wiles was entitled to a further unanimity instruction more explicitly addressing the specific (and, here, closely related) acts that embody a given means or method upon which the jury did unanimously agree.[11] See pp. 8-11, *supra* (discussing instructions); 7/28/94 Tr. 5 (C.A. App. 3345) (instructing jury: "The government has alleged a common scheme with respect to all three counts, Counts 1, 2, and 3, and the government is not required to prove each allegation in the scheme.

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[11] Although Wiles cites several decisions involving the securities laws, see Pet. 12-14, those decisions do not address the unanimity issue presented here. See, *e.g.*, *United States* v. *Langford*, 946 F.2d 798, 803 (11th Cir. 1991) (addressing claim that indictment was "multiplicitous" in that it contained *too many* counts alleging the same course of criminal misconduct), cert. denied, 503 U.S. 960 (1992).

The government must prove substantially the scheme that has been alleged."). More generally, even outside the securities law context, "where the crime charged involves a scheme to defraud perpetrated by the use of false statements, the jury need not agree with respect to which statements were false, provided there is unanimity concerning the existence of the fraudulent scheme." 1 L. Sand, et al., *Modern Federal Jury Instructions* ¶ 9.07, at 9-17 (1997) (citing, *inter alia*, *United States* v. *Gruenberg*, 989 F.2d 971, 975 (8th Cir.), cert. denied, 510 U.S. 873 (1993); *United States* v. *Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); and *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976)).

c. In any event, this case would be a poor vehicle for resolving any question concerning the jury-unanimity doctrine, because, in light of the instructions that the district court did give, the jury's verdict almost certainly satisfied even the more exacting unanimity requirement that petitioner Wiles proposes. Wiles claims (Pet. 14) that the "false statements" prong of Count 2 could have encompassed six distinct (albeit closely related) false or misleading statements in six separate documents, and the "insider trading" prong of Count 2 could have encompassed insider trading "*either* in April *or* May of 1988." Accordingly, he contends (Pet. 16), the jury "could convict him of making false statements without agreeing on which false statement; similarly, [it] could convict him of engaging in insider trading without agreeing on which trades constituted insider trading."

That speculation, however, is without merit. First, despite Wiles' contrary assertion (see Wiles Pet. 12,

14), Count 2 did not allege two discrete instances of insider trading. Instead, it charged that, "[i]n furtherance of the scheme to defraud, *between April 25, 1988 and May 17, 1988*, [Wiles] sold 150,000 shares of MiniScribe stock for approximately $1,711,250 while in possession of material non-public information concerning the inventory shortfall and its concealment." Pet. App. C6-C7 (emphasis added). Thus, to base its conviction on the insider trading prong of Count 2, the jury had to agree unanimously that, between the two dates alleged, Wiles in fact sold 150,000 shares of stock for approximately $1,711,250.

Second, there was no substantial danger that, if the jury relied on the false statements prong as a basis for Wiles' conviction, it failed to reach unanimity as to a specific false statement. The jury convicted petitioners on Count 1, which charged them with making false statements on the annual 10-K report filed with the SEC for fiscal year 1987, and further convicted Wiles on Count 3, which charged "the very same false statements at issue in Count 1." Wiles Pet. 8; accord 7/29/94 Tr. 8 (C.A. App. 3398) (instructing jury that "Count 3 is an allegation that the defendant defrauded Standard Chartered Bank * * * using the false statements alleged in Count 1"). Because the filing of that same 10-K report was included as one of the misrepresentations underlying the false statements prong of the securities fraud count, see Pet. 4; Pet. App. C5 (¶ 11), C8-C9 (¶¶ 2-3), the guilty verdict on those counts indicates that the jury did in fact unanimously agree on at least one of the false statements sufficient to support a conviction on Count 2.[12]

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[12] Although the court of appeals reversed Wiles' conviction on Count 1 because the district court rather than the jury

As a result, any error in the district court's unanimity instruction on Count 2 was logically irrelevant to Wiles' conviction on that count. See generally *Carella* v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in the judgment) ("When * * * other facts necessarily found by the jury[] are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed.").[13]

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found that his false statements had been material, this Court's subsequent decision in *Johnson* v. *United States*, 117 S. Ct. 1544 (1997), indicates that that conviction should have been affirmed under the plain-error standard, because, as the court of appeals itself determined, the "false 1987 10-K Report was capable of influencing, *and did in fact influence*, the SEC to take remedial action against Defendant." Pet. App. B7 (emphasis added); see *Johnson*, 117 S. Ct. at 1550. In any event, because the jury also convicted Wiles on Count 3, and because (as discussed below) the jury was in fact required to make a materiality determination with respect to Count 3, the guilty verdict on that count independently suggests the jury's unanimity with respect to a specific false statement charged in Count 2.

[13] Moreover, even if Wiles' view of the unanimity requirement were correct, it would still be unclear whether, fairly read, the district court's instructions constituted error at all. Although the indictment alleged that Wiles made six separate but related false statements, see p. 5, *supra*, the district court effectively narrowed the false statement prong of the indictment by instructing the jury—after the jury asked for clarification of the unanimity requirement—that that prong referred to "false statements in the annual reports." Pet. App. D3-D4. There were only two annual reports: the 10-K report filed with the SEC for fiscal year 1987, and the false annual report (also for fiscal year 1987) sent to the shareholders in the spring of

3. Finally, petitioner Wiles contends (Pet. 24-29) that the district court's instruction on 18 U.S.C. 1001 (Count 1), which removed the issue of materiality from the jury, infected the jury's consideration of the wire fraud charge (Count 3) by suggesting that no jury determination on the issue of materiality was required as to that offense either. As the court of appeals noted (Pet. App. A15 n.5, A29 n.11), that claim is without merit.

In its instructions on Count 3, as in its instructions on Count 2, the district court emphasized that materiality was an element of the offense and defined that element for the jury. See note 4, *supra*. The court also instructed the jury that a separate crime was charged in each count of the indictment, and it cautioned the jury to consider each count separately. See 7/28/94 Tr. 4-5 (C.A. App. 3344-3345). Under those circumstances, the jury could not have misunderstood its obligation to consider the materiality element presented in Count 3. See, *e.g.*, *United States* v. *Lopez*, 71 F.3d 954, 962 (1st Cir. 1995); cf. *United States* v. *Nash*, 76 F.3d 282 (1996) (reversing conviction where erroneous materiality instruction appeared, by its terms, to refer to all counts), opinion withdrawn and superseded, Nos. 91-50760, *et al.*, 1997 WL 345977 (9th Cir. June 25, 1997) (to be reported at 115 F.3d

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1988. The annual report to the shareholders contained the same false financial information that was contained in the annual report to the SEC. See Gov't C.A. Br. 18. Thus, if the jury based its conviction of Wiles on the false statements prong of the securities fraud count, the district court's supplemental instruction made it almost certain that the jury unanimously agreed that he made the false statements common to both the SEC and the shareholder annual reports. See also pp. 17-18, *supra*.

1431) (reinstating conviction). Wiles' factbound claim to the contrary warrants no further review.[14]

CONCLUSION

The petition for a writ of certiorari in No. 96-1839 and the cross-petition for a writ of certiorari in No. 96-8626 should be denied.

Respectfully submitted.

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[14] In any event, petitioner did not object to the instruction on Count 3. As a result, even if that instruction had erroneously removed the issue of materiality from the jury, which it did not, that error, like the instructional error concerning Count 1, would not justify reversal of Wiles' conviction. See notes 3, 12, *supra*.